(3)

No. 90-70

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAY DEPARTMENT STORES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's determination that when an independent union became a local affiliate of an international union, there was sufficient continuity between the independent union and the local affiliate to require petitioner to bargain with the local affiliate.

2. Whether, where the affiliation did not result in lack of continuity of representation, the Board's due process safeguards properly did not require that each separate bargaining unit within the independent union be afforded an opportunity to vote separately on affiliation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 897 F.2d 221. The decision and order of the National Labor Relations Board (Pet. App. 27a-54a), is reported at 289 N.L.R.B. No. 88 (1988). The court of appeals' first decision is reported at 774 F.2d 752 (1985). The court of appeals' decision following remand from this Court is reported at 797 F.2d 421 (1986). The original Board decision and order is reported at 268 N.L.R.B. 979 (1984).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1990. On April 11, 1990, the court denied petitioner's "petition for reconsideration en banc." [1] Pet. App. 25a-26a. The petition for a writ of certiorari was filed on July 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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[1] A suggestion for rehearing en banc, unlike a petition for panel rehearing, does not toll the time for filing a petition for a writ of certiorari. See Sup. Ct. R. 13.4; Fed. R. App. P. 35(c). Thus, if the document styled "petition for reconsideration en banc" was merely a suggestion for rehearing in banc, the instant petition for a writ of certiorari, filed over four months after entry of the court's judgment, is untimely.

However, the court of appeals may have treated the "petition for reconsideration en banc" as a petition for panel rehearing, whose pendency would toll the time for filing a petition for certiorari and thus render the instant petition timely. See Sup. Ct. R. 13.4. On April 17, 1980, petitioner moved for a stay of the mandate of the court of appeals. The NLRB opposed the motion, in part on the ground that it was untimely. The NLRB pointed out that, under Fed. R. App. P. 35(c), a suggestion for rehearing en banc does not stay the issuance of the mandate of the court of appeals. Therefore, according to the NLRB, because the "petition for reconsideration en banc" was in fact merely a suggestion for rehearing en banc, any motion to stay the mandate had to be filed "prior to the regularly scheduled date for the issuance of the mandate." Fed. R. App. P. 41(b). Because that date—21 days after the February 28 decision, see Fed. R. App. P. 41(a)—was March 21, 1990, petitioner's April 17, 1990, motion to extend the mandate was out of time. On April 20, 1990, the court issued an order staying the mandate, thereby indicating that it may have viewed the earlier petition as encompassing a petition for panel rehearing. Cf. *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1660-1662 (1990).

STATEMENT

1. In 1978, petitioner acquired eleven stores from Jewel Companies, Inc., and recognized the United Retail Workers Union (URW) as the representative of its employees in the two existing bargaining units: one covering ten Chicago-area stores, the other covering a single store in Decatur, Illinois. Pet. App. 30a.

The URW was an independent union with four locals and about 22,500 members, including 1,214 members employed by petitioner. Pet. App. 32a n.10, 33a, 37a. In 1981, the leadership of the URW approved a plan to merge with the United Food and Commercial Workers International Union, AFL-CIO, CLC (UFCW). Pet. App. 31a. The URW sent ballots to 20,548 of its members who were eligible to vote;[2] of those who returned valid ballots, 6823 voted for affiliation and 2344 were opposed. Pet. App. 32a-33a.[3] The UFCW then granted a charter to the URW officers and the URW became United Retail Workers Union, Local 881, affiliated with the UFCW. Pet. App. 36a.

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[2] Before the balloting, all URW members received a copy of the proposed merger agreement reached by the officers of the two unions, as well as a copy of the UFCW's constitution. Officers of the two unions also conducted, with prior notice to all URW members, a series of special information meetings regarding the affiliation referendum and sent explanatory materials to all URW-represented employees. In addition, the URW set up a telephone hot line to answer affiliation-related questions. Pet. App. 31a-32a.

[3] Of the 1214 ballots mailed to members employed by petitioner, 389 were returned and tabulated. Because all ballots were commingled before tabulation, it is not possible to determine how these 389 employees voted. Pet. App. 33a.

Under the merger agreement, URW's four administrative districts were redesignated as administrative districts of Local 881. Pet. App. 38a. The governing structure of Local 881 remained virtually identical to that of the URW: the URW's board of governors became Local 881's general executive board, and the former URW executive council and professional staff now constitute the Local 881 executive council. Local 881 obtained exclusive authority to administer URW's collective-bargaining agreements. Collective agreements remained subject to ratification vote by the affected local members, but the UFCW reserved the right to approve initial contract proposals and to approve contracts prior to submission to members for ratification. Pet. App. 38a.

After the merger, URW strike vote procedures were to remain fundamentally unchanged except that a strike would require approval by the UFCW. Pet. App. 38a-39a. Local 881 also retained the right to set its own dues, subject to the minimums set forth in the UFCW international constitution and approval by the UFCW. Pet. App. 39a.

2. Petitioner refused to recognize and bargain with Local 881 and instead petitioned the Board for elections to be held in its two units. The Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with Local 881. The Board ultimately dismissed the complaint, under the authority of its then-applicable *Amoco* rule,[4] requiring that non-union bargaining unit employees be al-

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[4] *Amoco Products Co.*, 262 N.L.R.B. 1240 (1982), aff'd *sub nom. Local Union No. 4-14, Oil, Chemical & Atomic Workers International* v. *NLRB*, 721 F.2d 150 (5th Cir. 1983).

lowed to participate in union affiliation elections. 268 N.L.R.B. 979 (1984).[5]

The court of appeals affirmed, *URW Local 881* v. *NLRB*, 774 F.2d 752 (7th Cir. 1985), and Local 881 sought a writ of certiorari from this Court. Pet. App. 28a.

While Local 881's petition for certiorari was pending, this Court issued its decision in *NLRB* v. *Financial Institution Employees, Local 1182 (Seattle-First)*, 475 U.S. 192 (1986), holding that the Board's *Amoco* rule exceeded its authority. Accordingly, the Court granted Local 881's petition for certiorari and remanded the case to the court of appeals. The court of appeals held that the Board could not require that non-union members vote in the affiliation referendum before a bargaining obligation would attach and remanded the case to the Board for further proceedings consistent with its opinion. *URW Local 881* v. *NLRB*, 797 F.2d 421 (7th Cir. 1986).

3. On remand, the Board found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 881, engaging in direct dealings with the employees and refusing to honor provisions of the collective agreement governing rights and responsibilities of the bargaining representative. Pet. App. 46a. In so finding, the Board concluded that the merger had not raised a "question of representation," see 29 U.S.C. 159(c), because there was continuity in the bargaining representative and due process safeguards were observed in the conduct of the merger referendum. Pet. App. 45a.

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[5] Although the unions referred to their relationship alternatively as "merger" or "affiliation," the court of appeals noted that nothing turned on the label attached to the relationship. See Pet. App. 2a n.1, 28a n.4.

The Board noted that "[i]n assessing the adequacy of the opportunity to vote on affiliation, the Board has traditionally examined whether due-process safeguards have been met, *i.e.*, whether employees were given notice of the impending affiliation election and a sufficient opportunity to discuss the affiliation and to ask questions about it, and whether precautions were taken to preserve the secrecy of the ballot." Pet. App. 40. The Board found that the URW membership was given sufficient notice of, information regarding, and opportunity to discuss the affiliation election to be able to make an informed decision; that all members were able to vote on the referendum; and that the secrecy of the ballot was maintained. Pet. App. 41a.

The Board rejected petitioner's contention that due process was violated because the ballots from all of the voters were commingled. The Board stated that because the affiliation did not disrupt the continuity of the representative, and because the balloting was properly conducted, it was irrelevant how the employees in each particular unit voted. Citing *Seattle First*, 475 U.S. at 202, the Board explained that, "[w]here there is continuity of representative, an employer has no more right to seize the occasion for questioning majority sentiment in the unit than it would have i[f] the bargaining representative had simply changed its own constitution." Pet. App. 42a.

The Board noted that, on the question of continuity of representation, this Court indicated in *Seattle First* that the test is whether the affiliation or merger produced a change "sufficiently dramatic to alter the union's identity." 475 U.S. at 206. The Board determined that "no such dramatic alteration of identity has been shown." Pet. App. 43a. On the contrary,

the Board found, "[t]he authority of the pre- and post-affiliation leadership * * * remains constant" (Pet. App. 44a), and "there has been no substantial impairment or reduction of legal autonomy" Pet. App. 45a. In the latter regard, the Board rejected petitioner's contention that the local's autonomy was negated by the rights of the UFCW International to approve collective bargaining proposals, agreements, and strike decisions. The Board explained (*ibid.*):

> These reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs. Indeed, if such conditions were sufficient to warrant a finding that an affiliation had produced changes in the local that raised a question concerning representation, this would be tantamount to a conclusion that virtually any affiliation of a local with an International would raise such a question. We see no basis in either precedent or policy for such a rule.

4. The court of appeals upheld the Board's findings and conclusions and enforced its order. The court concluded that substantial evidence supported the Board's findings that the election procedures comported with due process requirements (Pet. App. 14a), and that there was continuity between the pre- and post-affiliation unions (Pet. App. 19a).

The court found petitioner's contention that due process was violated by commingling of the ballots unsupported by precedent and "also inconsistent with the spirit, if not the letter of [*Seattle-First*]." Pet. App. 13a. The court pointed out that petitioner's "suggested requirement would force the Board to

micro-manage the collection and tallying of union referendum ballots in direct contradiction to * * * the general message of [*Seattle-First*] that affiliations or mergers, like a union's decision to alter its own constitution, are basically internal union affairs." Pet. App. 13a-14a.

Concerning the Board's continuity finding, the Court agreed that "primary control over the negotiation and implementation of collective bargaining agreements is vested in Local 881's officers and that the ultimate authority to reject or accept agreements lies with the local members." Pet. App. 18a. The court also agreed that "the strike-authorization procedure was not altered significantly by the merger." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the Board erred in finding sufficient continuity between the pre-affiliation URW locals and the corresponding districts of the post-affiliation UFCW Local 881 to warrant a requirement that petitioner recognize and bargain with Local 881. That fact-based contention raises no issue warranting review by this Court.

As this Court has recognized, "[t]he Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation." *Seattle First*, 475 U.S. at 209. Further, an affiliation only presents a question concerning representation where the "organization and structural change[s] * * * may substantially change a certified union's relationship with the employees it represents." *Seattle First*, 475 U.S. at 202.

In making this factual determination, the Board compares the pre- and post-affiliation representatives

to decide whether there were changes "sufficiently dramatic" to alter "the fundamental character of the representing organization." *Western Commercial Transport, Inc.*, 228 N.L.R.B. No. 27 (Mar. 25, 1988), slip op. 13, 14 (quoting *Seattle-First*, 475 U.S. at 206). The Board considers a range of factors, including structure, assets, the continued leadership responsibilities of the existing union officials, and the manner in which contracts are negotiated and administered and in which grievances are processed. *E.g.*, *Western Commercial Transport, Inc.*, slip op. 11. Here, as the court of appeals noted, the Board followed that approach and found that "no * * * dramatic alteration of identity had been shown." Pet. App. 43a. Thus, the Board found that Local 881's leadership and governing structures are virtually identical to those of URW and that the authority of Local 881's leadership remains fundamentally unchanged. Petitioner's challenge to these findings raises essentially a factual issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[6]

Contrary to petitioner's contention (Pet. 7-11), the court of appeals properly upheld the Board's finding

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[6] Petitioner asserts (Pet. 12-13) that additional evidence of a question of representation is provided by its contention (made in a motion to reopen the record before the Board) of change in composition of its work force since the affiliation election. However, as the court of appeals noted (Pet. App. 21a-23a), in its motion to reopen the record petitioner did not allege any current doubt as to the union's continuing majority status. Moreover, it is well settled that the passage of time during litigation—and any changes incident thereto—do not relieve an employer of an obligation to bargain. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944); *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962).

that provisions in the UFCW constitution concerning International approval of bargaining proposals, contract agreements, and strikes do not demonstrate substantial diminution of local autonomy. As the Board noted, those provisions only permit the International to react to local initiatives and do not supplant affiliated locals' primary responsibility to conduct their own affairs.[7] As the Board further pointed out, a contrary holding would mean that any affiliation of a local with an international would raise a question of representation because such provisions are typically found in international union constitutions. Thus, as the court of appeals noted (Pet. App. 17a n.9), petitioner's position is inconsistent with *Seattle First*. There the Court made plain that "affiliation does not necessarily implicate the 'selection' of a new bargaining representative." 475 U.S. at 203.[8]

2. Petitioner also contends (Pet. 14-21) that minimal due process standards were not met here because

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[7] Petitioner's reliance (Pet. 11) on the International's authorization for payment of strike benefits ignores the normal quid pro quo nature of the merger. Local 881 has access to a larger strike fund with a larger pool of contributors than it had as an independent union.

[8] Petitioner (Pet. 9-10) relies on several Third Circuit cases—*Sun Oil Co.* v. *NLRB*, 576 F.2d 553 (1978); *NLRB* v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (1976); *American Bridge Div., U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972)—as suggesting that normal attributes of affiliation may justify a finding of loss of continuity. But those cases predate *Seattle First*. Other circuits have questioned their continued validity in light of *Seattle First*. See *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 967-968 (1st Cir. 1986); *Seattle-First National Bank* v. *NLRB*, 892 F.2d 792, 798 (9th Cir. 1989), cert. denied, 110 S. Ct. 2618 (1990). See also *News/Sun Sentinel Co.* v. *NLRB*, 890 F.2d 430, 433 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3238 (1990).

employees in each separate bargaining unit represented by the URW were not permitted an independent choice concerning the affiliation decision. There is no merit to that contention.

In *Seattle-First*, the Court made clear that where a change in union organization does not raise a question of representation, "[t]he reorganized union may legitimately claim to succeed as the employee's duly selected bargaining representative" (475 U.S. at 203), and "the Act gives the Board no authority to require unions to follow [any specific] procedures in adopting organizational changes." *Id.* at 204. Accordingly, in *Seattle-First* the Court held that the Board could not require that non-union employees be allowed to vote for affiliation in the absence of a question concerning representation. So too here, the court of appeals correctly concluded that, in the absence of a question of representation, the Board properly refused to "micro-manage" the URW's internal election procedure. See *NLRB* v. *Eastern Connecticut Health Services, Inc.*, 815 F.2d 517, 518-519 (2d Cir.), cert. denied, 484 U.S. 846 (1987).

As the court of appeals noted (Pet. App. 12a, n.7), the Sixth Circuit cases that petitioner relies upon (Pet. 17-19), *William B. Tanner Co.* v. *NLRB*, 517 F.2d 982 (1975), and *NLRB* v. *Canton Sign Co.*, 457 F.2d 832 (1972), do not expressly hold that a union affiliation election must be conducted on a unit-by-unit basis.[9] In any event, both cases were decided be-

[9] In *Tanner*, in a brief per curiam opinion denying enforcement of the Board's order, the court concluded, without elaboration, that the record did not show "that the successor or merged union is the authorized bargaining representative of the employees in the appropriate unit." 517 F.2d at 983. In *Canton Sign*, the court indicated that evidence that employees of a particular unit voted for affiliation would not be

fore *Seattle-First*. To the extent that they would require a unit-by-unit polling of union members in affiilation elections, they are inconsistent with *Seattle-First*. Because the Sixth Circuit has not had an opportunity to reconsider those decisions in light of *Seattle-First*, further review of the present case simply to settle a conflict that may not exist would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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necessary where the new union was a "continuation" of the old (457 F.2d at 839) and also pointed out that there was no evidence that the employees at issue had ever chosen to be represented by the pre-merger union. *Id.* at 834.

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